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November 8, 2004

Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: ***In re Anderson Hawthorne on Habeas Corpus***
Supreme Court No.: S116670
[Related Case Nos. S097160; S065934; S004707; Crim. No. 25218 and LASC No. A36104]
Application of Protection & Advocacy, Inc., Pursuant to this Court's October 29, 2004 Order, For Permission to File a Letter Brief in Support of Petitioner and Letter Brief [Application Made Pursuant to Court Order; and Under Rule of Court 29.1(f)]

Dear Chief Justice George and Associate Justices:

This letter consists of an application for permission to file a letter brief and a letter brief on the merits in the above case submitted by Protection & Advocacy, Inc. (hereafter "PAI"). The letter brief supports Petitioner Hawthorne. It is submitted pursuant to this Court's Order of October 29, 2004 granting a Motion to Establish Schedule for Filing of Amicus Briefs.

In addition, even though this is an original proceeding in this Court, and thus not an action covered by the exact letter of the California Rules of Court insofar as they define procedures for the filing of letters and briefs from *amici curiae*, PAI notes that the Chief Justice can consider an application for permission to file a brief under California Rules of Court, Rule 29.1(f).

Because of the importance of the issues presented in and by this case, and for the reasons explained below, PAI urges the Court to grant its application and to file this letter brief under the terms of its Order of October 29, 2004.

Pursuant to Rule 14 of the California Rules of Court, Protection and Advocacy, Inc. (hereinafter PAI) respectfully applies on its own behalf for leave to file the appended Amicus Curie brief in support of petitioner, Anderson Hawthorne (hereinafter Mr. Hawthorne). Amicus will show that a decision by this Court adopting a definition of mental retardation that requires an individual to exhibit a threshold intelligence quotient (hereinafter IQ) score of <70 would be inconsistent with nationally accepted clinical definitions of mental retardation and with existing state and federal statutes defining the term. Amicus will also show that California Courts and Administrative Law Judges who interpret the State's definition of mental retardation outside of the criminal context expressly reject application of a threshold IQ requirement. Finally, amicus will show that adopting a specific or threshold IQ requirement for defining mental retardation could negatively impact numbers of persons' eligibility for essential State services and programs.

PAI therefore urges this Court to reject a threshold IQ score requirement for determining whether an individual has mental retardation, and to adopt the commonly accepted clinical definition of mental retardation instead.

INTERESTS OF AMICUS CURIAE

Protection and Advocacy, Inc. (PAI) is a private non-profit agency established under federal law to protect, advocate for and advance the human, legal and service rights of Californians with disabilities.[1] PAI works in partnership with

[1] PAI provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, PL 106-402; the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801, PL 106-310; the Rehabilitation Act, 29 U.S.C. § 794e, PL 106-402; the Assistive Technology Act, 29 U.S.C. § 3011, 3012, PL 105-394; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. § 1320b-20, PL 106-170; the Children's Health Act of 2000, 42 U.S.C. § 300d-53, PL 106-310; and the Help America Vote Act of 2002, 42 U.S.C. § 15461-62, PL 107-252.

people with disabilities, striving towards a society which values all people and supports their rights to dignity, freedom, choice and quality of life.

PAI began working on behalf of Californians with mental retardation and other developmental disabilities in 1978, and has since expanded its services to people with all categories of disability - sensory, physical, medical, learning, cognitive, genetic, emotional and psychiatric. Services provided by PAI are client-directed, and include information and referral, technical assistance and direct representation in administrative and court proceedings. PAI has extensive experience working with people with mental retardation in a wide variety of settings, including jails, prisons and other institutions.

In addition to the provision of direct services to Californians with disabilities, PAI staff conducts outreach and training activities throughout the state to increase consumer knowledge of anti-discrimination laws and disability services, and to promote self-advocacy and empowerment.

PAI has a direct interest in the outcome of this case. PAI represents numbers of Californians whose right to services, right to be free from discrimination, and right to be free from application of the death penalty are contingent upon how the State of California defines the term mental retardation. PAI has a general interest in ensuring that courts and governmental agencies do not substitute their judgment for that of clinical professionals when it comes to defining the diagnostic characteristics of medical and psychiatric conditions. PAI has a specific interest in ensuring that California not adopt a definition of mental retardation that is contingent upon a specific or threshold IQ score. Such an approach is inconsistent with clinical standards and will unjustly narrow the scope of the death penalty exemption prescribed in *Atkins v. Virginia* and codified at California Penal Code section 1376. Moreover, such an approach will negatively impact a numbers of persons' eligibility for State programs and services by encouraging a departure from commonly accepted clinical standards in those contexts as well.

NEED FOR AMICUS PARTICIPATION

PAI seeks permission to participate as Amicus in order to present a perspective broader than that of the individual petitioner. PAI will discuss how state and federal statutes do not reference or use a specific or threshold IQ score in defining mental retardation. Rather, they reflect nationally accepted clinical definitions of the term. PAI will also discuss how the California courts, in interpreting these statutes, have adopted and deferred to the commonly used standards of the scientific community in making mental retardation determinations. Finally, PAI will discuss how adopting a specific or threshold IQ requirement for mental retardation in this case could impact numbers of persons' eligibility for not only the death penalty exemption, but for State programs and services including but not limited to regional center services (Welf. & Inst. Code § 4500 et seq.), and misdemeanor criminal diversion (Cal. Pen. Code § 1001.20) as well.

BRIEF OF AMICUS CURIAE

SUMMARY OF ARGUMENT

To the extent that there is serious disagreement about the execution of persons with mental retardation, it is in determining *who has* mental retardation.[2] There is a broad social and professional consensus in this nation against executing persons who have mental retardation.[3] In California, that consensus is codified at Penal Code section 1376, the statute that creates and defines a death penalty exemption for persons with mental retardation and implements the U.S. Supreme Court's decision in *Atkins v. Virginia*[4] (holding that executions of criminals with mental retardation are "cruel and unusual punishments" prohibited by the Eighth Amendment) throughout the state.

As with any other medical or psychiatric condition, courts must defer to clinical professionals and current clinical standards to define the term mental retardation. This definition is what will guide courts in applying the law to facts in deciding cases such as Anderson Hawthorne's.

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[2] *Id.*
[3] *Atkins v. Virginia.* (2002) 536 U.S. 304, 316, fn 21.
[4] 536 U.S. 304.

The scientific/medical community has rejected a threshold IQ requirement of <70 in defining mental retardation. A review of the manner in which the term has been defined over the years reflects a strong shift in focus from a statistical approach to a multifactor approach that places greater emphasis on adaptive skills and environmental support needs.

The California legislature has deferred to clinical interpretations of the term, by enacting statutory language that does not impose a threshold IQ requirement of <70 in defining or referring to mental retardation. California courts and administrative tribunals have similarly deferred to the clinical community in rejecting the notion of such a threshold IQ.

Should this Court adopt a definition of mental retardation that incorporates a threshold IQ of <70, numbers of persons will be rendered legally unable to avail themselves of the State's death penalty exemption, despite the fact that they may very well meet the clinical definition of mental retardation and exhibit seriously compromised understanding and criminal culpability. Moreover, should the Court recognize an IQ threshold of <70, it will embolden lower courts and governmental agencies to deny services and program eligibility to numbers of persons with IQs between 70 and 75 who desperately need them.

I. IN DEFINING "MENTAL RETARDATION" TODAY'S CLINICIANS DO NOT IMPOSE A THRESHOLD IQ REQUIREMENT. RATHER, THEY HAVE ACCEPTED A MULTIFACTOR DEFINITION FOCUSING ON FUNCTIONAL ABILITY.

The American Association on Mental Retardation (AAMR), an international multidisciplinary association of professionals, has served a central role in understanding, defining, and classifying the condition known as mental retardation for decades. According to their website, the AAMR has updated the definition of mental retardation ten times since 1908.[5] Changes in the definition have occurred

[5] Although the definition of mental retardation has changed throughout the years, the basic elements of the definition have remained constant since approximately 1900: onset in childhood, significant intellectual or cognitive limitations, and an inability to

when there is new information, changes in clinical practice or breakthroughs in scientific research.[6] These changes mirror evolving perspectives on the nature, etiology, and functional consequences of mental retardation.[7] The changes outlined below, beginning in 1959 are most relevant to the case at hand.

In 1959, the AAMR proposed and adopted the following definition of mental retardation: "subaverage general intellectual functioning which originates in the developmental period and is associated with impairment in adaptive behavior."[8] A five level classification scheme was also introduced at this time, according to which 85 was the threshold IQ score below which a person was considered to have mental retardation.[9]

In 1973, due to the growing awareness of the damaging social prejudice experienced by those labeled "retarded", the AAMR revised its definition, changing the upper IQ limit from <85 to ≤70. Four years later, the upper IQ limit was changed again. It was modified to represent a range of 70 – 75 to account for widely recognized standard measurement error.[10]

In 1992, the AAMR redefined mental retardation as "substantial limitations in present functioning. … characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living,

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adapt to the demands of everyday life. *See*, R.C. Sheerenberger, *A History of Mental Retardation* (Baltimore: Brookes Publishing Co., 1983).

[6] American Association on Mental Retardation. Fact Sheet: Frequently Asked Questions About Mental Retardation. Updated September 2004. Viewed on 11/06/04.

[7] Bellini, J. Mental Retardation: Definition, Classification, and Systems of Supports (2003) *Mental Retardation:* Vol. 41, No. 2, p. 135.

[8] Heber R. (1961) Modification in the manual on terminology and classification in mental retardation. American Journal of Mental Deficiency, 65, 499-501.

[9] *See* Biasini, F.J., Grupe, L., Huffman, L., and Bray, N.W. (1999). Mental retardation: A symptom and a syndrome. In S.D. Netherton, D.L. Holmes, and C.E. Walker (eds.), *Comprehensive textbook of child and adolescent disorders*. New York: Oxford University Press.; and R.C. Sheerenberger, (1983) *A History of Mental Retardation* (Baltimore: Brookes Publishing Co., 1983).

[10] Grossman, H.J. (Ed.). (1977). Manual on terminology in mental retardation (1977 rev.). Washington, D.C.: American Association on Mental Deficiency.

social skills, community use, self-direction, health and safety, functional academics, leisure, and work."[11,12] The 1992 definition was a departure from prior definitions, in that it recognized mental retardation as functional and interactionist rather than statistical, and proposed that classifications be based on the intensity of needed supports (ranging from intermittent to pervasive) rather than on the severity of impairment (i.e., mild, moderate, severe, and profound categories based on IQ scores).[13]

The AAMR's 1992 definition of mental retardation was the most commonly used definition in the United States[14] for years before it was altered once more. In 2002, the AAMR's definition was modified to "a disability characterized by significant limitations in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[15,16] This definition, which is current as of today, maintains a strong commitment to a person-centered, ecological approach to defining and classifying persons with mental retardation.

The AAMR definition of mental retardation is consistent with that contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders[17], fourth edition (DSM-IV), published in 1994 and fourth edition,

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[11] American Association on Mental Retardation. (1992). Mental retardation: Definition, classification, and systems of supports (9th ed.) at p. 5. Washington, D.C.: American Association on Mental Retardation.

[12] The definition also required that onset be prior to age 18. *Id.*

[13] Bellini, J.Mental Retardation: Definition, Classification, and Systems of Supports (2003) *Mental Retardation:* Vol. 41, No. 2, pp. 135–140.

[14] S.R. Schroeder, M. Gerry, G. Gertz, F. Velazquez , Kansas University Center on Developmental Disabilities, Center for the Study of Family, Neighborhood and Community Policy (2002) Usage of the Term "Mental Retardation:" Language, Image and Public Education. p. 3.

[15] Luckasson, R., Borthwick-Duffy, S., Buntinx, W. H. E., Coulter, D. L., Craig, E. M., Reeve, A. et al. (2002). Mental retardation: Definition, classification, and systems of supports (10th ed.) at 73-76.

[16] The definition also required that onset be prior to age 18. *Id.*

[17] The Diagnostic and Statistical Manual of Mental Disorders is recognized as a standard reference work containing a comprehensive classification and terminology of mental disorders. (*See, Money v. Krall* (1982) 128 Cal.App.3d 378, 384, fn. 2), and is typically used by physicians and mental health professionals to diagnose mental disorders

text revision (DSM-IV-TR), published in 2000. Both define the term "mental retardation" as meaning "significantly subaverage intellectual functioning" of "an IQ of *approximately* 70 or below" with "concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."[18,19] *Emphasis added.*

In discussing general intellectual functioning and the relative importance of IQ scores in diagnosing mental retardation, the DSM-IV-TR states that although "significantly subaverage intellectual functioning is defined as an IQ of about 70 or below, . . . it should be noted that there is a measurement error of approximately 5 points in assessing IQ. Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."[20]

The DSM-IV-TR goes on to state that "*Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation*"[21] (emphasis added), reflecting, as does the current AAMR standards, a multifactor approach to defining mental retardation that focuses on adaptive functioning.

II. THE CALIFORNIA LEGISLATURE HAS REJECTED A THRESHOLD IQ REQUIREMENT IN DEFINING MENTAL RETARDATION.

California statutes do not utilize a threshold IQ requirement of <70 when defining mental retardation and, in deference to current clinical standards have

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including mental retardation. The first edition (DSM-I) was published in 1952, the second edition (DSM-II) in 1968, the third edition (DSM-III) in 1980, the fourth edition (DSM-IV) in 1994, and the most recent edition (DSM-IV-TR) in 2000.

[18] DSM-IV-TR at 41.

[19] The definition also required that onset be prior to age 18. *Id.*

[20] *Id.*

[21] DSM-IV-TR at 42.

adopted definitions that are very similar to the AAMR definition and/or to the definition contained in the DSM-IV-TR. Deferring to professional standards in defining mental retardation is particularly important because that clinical label is used to determine who can access publicly funded services and supports.

A. Penal Code section 1001.20

Penal Code section 1001.20, which provides for the criminal diversion of misdemeanants with mental retardation, defines mental retardation as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Similar to both the AAMR and DSM definitions of mental retardation, this statute contains no reference to a specific or threshold IQ score.

B. Welfare and Institutions Code section 1376

Of particular relevance to this case, Welfare and Institutions Code Section 1376 utilizes the same definition of mental retardation as Penal Code § 1001.20 in implementing the Supreme Court's decision in *Atkins v. Virginia* (2002) 536 U.S. 304 (2002)(creating a death penalty exemption for persons with mental retardation). The legislature expressly rejected adoption of a threshold IQ requirement for determining whether an individual has mental retardation when drafting this statute.[22]

C. Welfare and Institutions Code Sections 4512(a) and 6500

The California legislature has, in some instances, expressed its deference to clinical standards by not defining the term mental retardation in the statute referencing the condition at all. (*See e.g.*, Welf. & Inst. Code § 4512(a)(authority for the provision of state funded treatment and habilitative services to persons with mental retardation and other "developmental disabilities") and Welf. & Inst. Code section 6500 (authorizing the state to civilly commit an individual with mental

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[22] *See*, Chief Counsel Bruce E. Chan, California Legislature, Analysis of July 1, 2003 Hearing of the Assembly Committee on Public Safety on SB 3 (Burton). http://info.sen.ca.gov/pub/bill/sen/sb_0001-0050/sb_3_cfa_20030630_101027_asm_comm.html Viewed on 11/06/04.

retardation who is determined to be a danger to self or others). As discussed below, California Courts and Administrative Tribunals interpreting these statutes have consistently rejected a threshold IQ requirement of <70 in defining mental retardation.

D. Consistency with Federal Statutes

It is worth noting that California law reflects the approach taken in federal statutes defining mental retardation. These statutes have also rejected a threshold IQ requirement. For example, the Social Security Administration's Listing of Impairments defines the term mental retardation as "significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period" for purposes of determining eligibility for Social Security benefits.[23] The Individuals with Disabilities Education Act similarly defines the term mental retardation ("significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period") for purposes of determining eligibility for special education services.[24]

E. California Courts and Administrative Tribunals have Rejected Specific or Threshold IQ Requirements for Determining Whether an Individual has Mental Retardation.

California courts have addressed the meaning of the term mental retardation previously. In the California Appellate case of *Money v. Krall*[25] the Court of Appeals rejected the contention that Welfare and Institutions Code section 6500 was unconstitutionally vague for failure to define the term "mental retardation." The court held that such failure did not render the statute unconstitutional, in part because the term had a demonstrably established technical meaning.[26]

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[23] Social Security Administration, SSA Pub. No. 64-039: Disability Evaluation Under Social Security (January 2003) Office of Disability Programs ICN 468600.

[24] 34 C.F.R § 300.7(c)(6).

[25] 128 Cal.App.3d 378 (1982).

[26] *Id.* at 397.

In rendering its decision, the court referred to "the most widely used definition" of mental retardation, that of the American Association on Mental Retardation: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" and appearing in the 'developmental period.'"[27]

The *Money* court went on to discuss intellectual functioning, recognizing that IQ ceiling values are "inherently somewhat arbitrary"[28] and that performance on standardized intelligence tests is "affected by cultural variables and other factors."[29] Those points of "unavoidable uncertainty," opined the court, "underscore the importance utilizing a multifactor diagnostic approach" like that found in the DSM.[30]

The rejection of a threshold IQ requirement for mental retardation is most apparent, and best illustrated in the context of regional center eligibility cases, where the issue to be decided is eligibility for lifelong case management and treatment and habilitation services from the State pursuant to the Frank D. Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code section 4500 *et seq*.). The statutory language of the Lanterman Act itself does not define the term mental retardation. The term is mentioned only as one of a number of conditions with which one might establish eligibility for services. When these cases have been litigated in the courts or in state administrative hearings, tribunals have taken a multifactor approach in determining whether an individual has mental retardation - relying on functional definitions and expressly rejecting a threshold IQ score of <70.

For example, in *Yobi v. Allenby* (Sacramento Superior Court Case No. 00CS00846), a woman who's IQ never tested to be below 70 prior to age 18 was determined to have mental retardation and to qualify for regional center services. In rendering its decision, the court noted that "the DSM-IV guideline in fact allows for a classification of mental retardation with an IQ score as high as 75 based on a

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[27] *Id.* at 397 (citing Herr, The New Clients: Legal Services for Mentally Retarded Persons (1979) 31 Stan.L.Rev. 553, 555).

[28] *Id.*at 397 (citing the DSM-III, p.37).

[29] *Id.* at. 397 (citing Herr, *supra.*, at p. 556).

[30] *Id.* p.397.

5 point margin or error." As a second example, in the case of *Aaron K. v. Inland Regional Center* (OAH[31] No. L 2003080512), a 13 year old boy presenting with a full scale IQ score of 74 was determined to be eligible for regional center services. In that case, the Administrative Law Judge cited the DSM-IV in his opinion, noting that "a person with an IQ between 70 and 75 who exhibits significant deficits in adaptive behavior could possibly be diagnosed with mental retardation."[32,33,34]

III. SANCTIONING OF A THRESHOLD IQ REQUIREMENT WOULD RESULT IN A LOSS OF NEEDED PROGRAMS AND SERVICES TO PERSONS WHO NEED THEM.

Should the Court sanction a narrower IQ standard for mental retardation than that which the scientific community universally accepts, people who meet the "clinical" definition of mental retardation but happen to have IQ scores above 70 will unjustly be sentenced to death and executed. This runs afoul of the broad consensus opposing the execution of persons with mental retardation as confirmed by the U.S. Supreme Court in *Atkins*. It would be fundamentally unfair to hold this class of persons to standards of competency and understanding that may be well beyond their cognitive reach based solely on an arbitrary intelligence test score.

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[31] The California Office of Administrative Hearings (OAH) is the state administrative tribunal that hears administrative appeals regarding, among others, eligibility for developmental disability treatment and habilitation services pursuant to Welf. & Inst. Code section 4500 *et seq.*

[32] *Aaron K. v. Inland Regional Center* (OAH No. L 2003080512). Hearing Decision at p. 7, citing DSM-IV p. 39-40.

[33] *See* also, OAH No.: 1999100201 *Cheryl F. v. Frank D. Lanterman Regional Center* at p. 7. ("The Diagnostic and Statistical Manual of Mental Disorders, 4th edition, (DSM-IV) is the bible of mental health professionals, and is relied on … for the definition of mental retardation"; OAH No.: L 2003080452 *Thomas U. v. Eastern Los Angeles Regional Center* at p. 4 (The Diagnostic and Statistical Manual of Mental Disorders, 4th edition, (DSM-IV) is the universally accepted description of symptoms supporting professional diagnoses…").

[34] Although these administrative hearing decisions are not of precedential value, we highlight them for the Court as substantive guidance. The administrative law judges in these cases regularly rule on whether a person has mental retardation and his/her eligibility for lifelong treatment and habilitative services, supports and programs.

In addition to the obvious impact this will have on persons with mental retardation facing death penalty convictions and executions, the Court's decision in this case will have a strong and far reaching impact on lower courts and governmental agencies responsible for determining the existence of mental retardation for the purposes of program eligibility and service entitlements throughout the state. These lower courts and governmental agencies will view a deviation from accepted clinical standards by this Court as license for them to proceed down a similar path. As a result, persons with IQ scores ≥70 who would otherwise qualify for disability related services and programs by meeting the clinical definition of mental retardation will face disqualification and/or be deemed "ineligible" for those services and programs based solely on their IQ scores without regard for individual functioning or need.

CONCLUSION

A decision adopting a threshold IQ requirement of <70, as suggested by the Attorney General, would run afoul of the well-established diagnostic standards of the clinical community. Amicus PAI urges the Court to reject a threshold IQ requirement and to defer to the clinical community's expertise in defining medical and psychiatric conditions by recognizing the nationally recognized margin of error inherent on IQ tests in this case and granting Mr. Hawthorne's petition for Writ of Habeas Corpus instead.

DATED: November 8, 2004

Respectfully submitted,

PROTECTION & ADVOCACY, INC.

By:_____
Michelle Uzeta
Attorney for Amicus Curiae